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In the Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a federal court should wholly abstain from adjudicating a claim, brought by a public utility against a local regulatory authority, that the authority is violating federal law by refusing to honor terms fixed by the Federal Energy Regulatory Commission for the interstate sale of electric power at wholesale.

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INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Part II of the Federal Power Act, 16 U.S.C. 824 *et seq.*, gives the Federal Energy Regulatory Commission (FERC) exclusive regulatory authority over the wholesale sale and the transmission of electric energy in interstate commerce. FERC is responsible for ensuring that all public utility rates or charges in connection with the transmission or sale of electric energy in interstate commerce are "just and reasonable" (16 U.S.C. 824d(a)). This case was preceded by FERC's decision requiring the four operating companies of a multi-state public utility system to purchase the capacity of a nuclear power plant owned by the system in proportions found by FERC to be just and reasonable. Because of the government's interest in ensuring the integrity of FERC's allocation of capacity and costs among

those operating companies, the United States and FERC participated as amici curiae in *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970 (June 24, 1988). They appeared in support of the public utility's argument there that FERC's exclusive regulatory authority barred the state from refusing to allow the utility to recover its FERC-allocated costs in its retail rates.

This case also implicates the integrity of FERC's authority. It presents the threshold question whether abstention principles preclude a public utility from seeking preliminary or permanent injunctive relief from a federal district court based on a virtually identical claim of federal preemption. The court of appeals in this case impeded the vindication of important federal energy policy by ruling, incorrectly in our view, that federal court abstention was required. At this Court's invitation, we filed a brief at the jurisdictional stage in which we urged that review be granted.

STATEMENT

1. Like *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970 (June 24, 1988), this case arises out of FERC's allocation of the capacity and costs of the Grand Gulf Unit No. 1 nuclear generating plant among four operating electric utility companies that are wholly owned subsidiaries of Middle South Utilities, Inc. (MSU). Petitioner, New Orleans Public Service, Inc. (NOPSI), is one of those four companies.[1] Each of the companies sells and exchanges electricity at wholesale across state lines, to each other as well as to unaffiliated companies. They also sell electricity at retail to local customers in separate

[1] The others are Mississippi Power & Light (MP&L), Louisiana Power & Light (LP&L), and Arkansas Power & Light (AP&L).

service areas located in four states. See *Mississippi Power & Light Co.*, slip op. 1-2.

A fifth MSU subsidiary, Middle South Energy, Inc. (MSE) (now Systems Energy Resources, Inc.), was formed in 1974 to own and finance two nuclear generating plants, Grand Gulf 1 and 2, and to sell power from those plants to the utility operating companies. By the late 1970s, it became evident that Grand Gulf's capacity would not be needed immediately to meet demand, which was lower than predicted in earlier forecasts. MSU continued to build the Grand Gulf units on the assumption that, partly because of the relatively low cost of nuclear fuel, the overall costs of Grand Gulf power per kilowatt hour would be lower than that of alternative energy sources. The investment cost of the plants continued to increase dramatically because of regulatory delay, additional construction requirements, inflation, and increased financing costs. As a result, MSU suspended construction of Grand Gulf 2, and, although the investment cost of both Grand Gulf units had been projected at $1.2 billion, the investment cost of Grand Gulf 1 alone proved to be approximately $3 billion. The wholesale cost of electric power produced by Grand Gulf 1, which went into commercial operation on July 1, 1985, greatly exceeds the cost of power generated by other system facilities. See *Mississippi Power & Light Co.*, slip op. 4 & n.5.

2. Under Part II of the Federal Power Act, 16 U.S.C. 824 *et seq.*, the Federal Energy Regulatory Commission (FERC) has exclusive regulatory authority over the transmission of electric energy in interstate commerce and the wholesale sale of electric energy in interstate commerce. FERC is responsible for ensuring that all public utility rates or charges in connection with the transmission or sale of electric energy in interstate commerce, as well as

all rules, practices, and contracts affecting those rates or charges, are just and reasonable (16 U.S.C. 824(a)).

In June 1985, FERC approved wholesale rates for electric power generated by Grand Gulf 1 and allocated its capacity and energy among the four MSU operating companies. See *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985), reh'g denied, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub. nom. Mississippi Indus.* v. *FERC*, 808 F.2d 1525 (D.C. Cir.), reh'g granted and vacated in part, 822 F.2d 1103 (D.C. Cir. 1987), cert. denied, No. 86-1380 (Dec. 14, 1987).[2] FERC rejected the New Orleans City Council's contention that NOPSI's share of Grand Gulf 1 costs should be 9 percent (see Pet. App. 30A-31A n.11; Br. in Opp. 4-5 n.4). FERC instead concluded that the operating companies should share in the MSU system's total investment in nuclear capacity "roughly in proportion to each company's share of System demand" (31 F.E.R.C. at 61,655-61,656). FERC ordered the following allocation of Grand Gulf 1 costs: AP&L, 36 percent; LP&L, 14 percent; MP&L, 33 percent; and NOPSI, 17 percent (*ibid.*). MSE has accordingly billed the four operating companies for their FERC-allocated share of Grand Gulf costs since Grand Gulf 1 went into service on July 1, 1985. See *Mississippi Power & Light Co.*, slip op. 5-10.

Each of the four operating companies has, with varying success, sought to recover those costs in its retail rates. In *Mississippi Power & Light Co.*, this Court reversed the Mississippi Supreme Court's refusal to allow MP&L full

[2] The District of Columbia Circuit remanded the case to FERC to consider issues relating to the correctness of its allocation of certain Grand Gulf 1 costs. See 822 F.2d at 1103. On remand, FERC further explained and reaffirmed its prior allocation. See *System Energy Resources, Inc.*, 41 F.E.R.C. ¶ 61,238 (1987), petition for review filed, No. 88-1067 (D.C. Cir.).

recovery of its FERC-allocated share of Grand Gulf costs. The Court held that the Mississippi Public Service Commission (MPSC) was required "to treat MP&L's FERC-mandated payments for Grand Gulf costs as reasonably incurred operating expenses for the purpose of setting retail rates" and therefore could not undertake a "prudence" review in order to decide whether to do so (slip op. 15, 17). The instant case is the third in a series of lawsuits that NOPSI has brought in federal district court against the Council of the City of New Orleans, which regulates NOPSI's retail rates, based on the Council's refusal to allow NOPSI to recover its Grand Gulf costs in those rates.

3. *NOPSI I:* On May 17, 1985, NOPSI applied to the Council for a retail rate increase to reflect the Grand Gulf 1 costs allocated to NOPSI by FERC. On July 17, 1985, the Council announced a public hearing, to be held on July 25, 1985, to consider whether interim rate relief for NOPSI was warranted (Res. R-85-423). The Council stated that the issue of interim rate relief needed to be addressed because "various factors, including questions as to the legality and prudency of the [contracts relating to Grand Gulf 1], the prudency and reasonableness of the said expenses, and lack of information on certain relevant matters, prevent the Council from either denying or granting the requested rate relief at the present time" (*ibid.*).

On August 2, 1985, NOPSI filed a complaint in federal district court seeking declaratory and injunctive relief, and money damages (86-546 Pet. App. 37A). NOPSI asked the court, inter alia, to issue preliminary and permanent injunctions enjoining the Council from denying NOPSI recovery, through its retail rates, of its FERC-allocated share of the expenses of Grand Gulf 1. While that action was pending, the Council on September 5, 1985, denied NOPSI's request for interim rate relief (Res. R-85-5261).

On September 16, 1985, the district court granted the Council's motion to dismiss. *NOPSI* v. *City of New Orleans,* No. 85-3398 (E.D. La.). The court held that dismissal was warranted under the Johnson Act, 28 U.S.C. 1342, and under the principles of *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943). *Burford* abstention was appropriate, the court concluded, because NOPSI's retail rates were a matter of local concern requiring local administrative expertise and because the Council's actions would not directly conflict with FERC's order.

While the district court's ruling was pending on appeal, the Council and NOPSI entered into a settlement agreement regarding the treatment of Grand Gulf 1 costs (Res. R-86-112). The agreement set out in detail the amounts by which NOPSI could increase its rate base annually until the costs of Grand Gulf 1 were fully recovered. Pursuant to that agreement, NOPSI also agreed permanently to absorb $51.2 million of the costs (*id.* at 4). Both sides purported to reserve their legal rights, including the Council's right to investigate the issue of prudence (*id.* at 11-12).

The court of appeals initially reversed both aspects of the district court's ruling,[3] but on its own motion for reconsideration subsequently reversed itself on the abstention issue. See *NOPSI* v. *City of New Orleans,* 782 F.2d 1236 (5th Cir. 1986), modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987). The court concluded that *Burford* abstention was appropriate because "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise" (798 F.2d at 862). The court also held that abstention was appropriate under *Younger* v. *Harris,* 401 U.S. 37 (1971), because there was an ongoing administrative proceeding before the Council: "NOPSI would have a full and fair opportunity to litigate its federal claims" through the state appellate process and there were no exceptional circumstances, such as bad faith or harassment, rendering abstention improper (798 F.2d at 864).

[3] See *NOPSI* v. *City of New Orleans,* 782 F.2d 1236 (5th Cir. 1986). The court concluded that the Johnson Act did not apply because NOPSI's request for injunctive relief rested on a "statutorily-based preemption claim" and therefore did not rest solely on the " 'repugnance of the order to the Federal Constitution,' " within the meaning of the Johnson Act (782 F.2d at 1242, quoting 28 U.S.C. 1342)). The court similarly concluded that *Burford* abstention was inappropriate where, as in this case, "the claim presented is predicated upon federal preemption" (782 F.2d at 1243).

NOPSI II: While *NOPSI I* was pending before the court of appeals, the Council announced on October 10, 1985, that it would conduct an investigation into "all aspects of NOPSI's prudence regarding its decisions to enter into its arrangements to purchase a portion of Grand Gulf 1 for the purpose of determining what portion, if any, of NOPSI's Grand Gulf 1 expense shall be assumed by its shareholders, rather than passed through to its retail ratepayers" (Res. R-85-636; see Pet. App. 5A-6A). On November 11, 1985, NOPSI filed a second lawsuit in federal district court in which it sought to enjoin the Council's prudence investigation. NOPSI subsequently amended its complaint to seek an injunction or declaratory relief only to the extent that the Council proposed taking any action to require NOPSI or its shareholders to absorb all or a portion of its FERC-allocated share of Grand Gulf costs.

The district court dismissed NOPSI's complaint. See *MSE* v. *Council of New Orleans,* No. 85-5273 (E.D. La. Dec. 19, 1986). The court ruled that NOPSI's claims were not ripe because it was not yet certain whether the Council intended to intrude into a regulatory area entrusted to

FERC's exclusive authority. The court ruled, in the alternative, that both *Younger* and *Burford* abstention were appropriate.

On appeal, the court of appeals affirmed the district court's dismissal on ripeness grounds and did not address the abstention issue. See *NOPSI* v. *Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987). The court recognized that the Council's prudence investigation could "certainly be interpreted as directed towards areas now off-limits to state regulators" (*id.* at 586). The court nonetheless concluded that NOPSI's request for injunctive relief was not ripe because the Council's inquiry presented "only a possibility of harm to NOPSI. If such harm occurs, the validity of the New Orleans City Council's action will depend on facts not yet in existence" (*id.* at 588). NOPSI would suffer no irreparable injury, the court said, by awaiting the completion of the Council's prudence inquiry (*ibid.*).

NOPSI III: On February 4, 1988, the Council disallowed $135 million of NOPSI's deferred Grand Gulf costs based on the Council's completed prudence inquiry. The Council accordingly required NOPSI to deduct that amount from its rate base and, in order to reflect the disallowance, reduced the rate increases then planned for NOPSI (Pet. App. 24A). The Council based its order on its finding that NOPSI had acted imprudently in three different ways: (1) "NOPSI's oversight and review of its Grand Gulf obligation was uncritical and severely deficient"; (2) "NOPSI made no effort to reduce its risk exposure in the wake of the Three Mile Island Nuclear incident in 1979-80, which demonstrated the risks of operating a nuclear reactor"; and (3) "NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment by selling a portion of its share of the power off-system, that is, to some other user." *Id.* at 8A. The Council explained,

however, that the amount disallowed did not reflect the full extent of NOPSI's imprudence, because that amount would have caused the utility to become insolvent (*id.* at 9A). The Council had instead disallowed only that amount—minus an additional ten percent "buffer"—that it concluded NOPSI could absorb without becoming insolvent (*ibid.*).

NOPSI then filed this action in federal district court, seeking a declaratory judgment and both preliminary and permanent injunctive relief from the Council's rate order. NOPSI's complaint was based solely on federal grounds: its principal claim was that the order was preempted by federal law, and it contended that this claim fell within the exclusive jurisdiction of the federal courts under the Federal Power Act, 16 U.S.C. 824 *et seq.*[4] NOPSI also argued that it would suffer irreparable harm absent preliminary injunctive relief. The disallowance of $135 million in deferred Grand Gulf costs, NOPSI claimed, would reduce its common equity, eliminate its retained earnings, render it unable to sell rate recovery bonds, jeopardize its ability to continue to pay its FERC-mandated allocation of Grand Gulf costs, and make it unable to pay dividends on either preferred or common stock for at least five years.

On March 10, 1988, the federal district court dismissed NOPSI's complaint (Pet. App. 22A-33A). The court agreed with NOPSI that the Johnson Act does not preclude federal court jurisdiction over the lawsuit (*id.* at 25A-26A), but concluded that federal courts do not have exclusive jurisdiction under the Federal Power Act over NOPSI's federal preemption claim (*id.* at 31A-32A). The court also concluded that both *Burford* and *Younger* abstention were warranted. According to the court,

[4] The complaint also alleged that the Council's actions violated the Commerce Clause and were barred by doctrines of estoppel.

abstention was not precluded because the federal government has "not entirely preempted state regulation of retail sales of electricity" and "there is no facial conflict" between FERC's allocation of Grand Gulf costs and the Council's rate order (*ibid.*).

The court of appeals affirmed (Pet. App. 2A-20A). In examining the appropriateness of *Burford* and *Younger* abstention, the court assumed that it is "now clear" that NOPSI could prove "as it alleges, with some apparent evidentiary support," that the Council's order "is beyond the Council's retail ratemaking authority and violates federal law" because the order "results in 'trapping' [of] FERC allocated costs in violation of federal law" and "was based on factors that the state could not legally consider" (*id.* at 11A). The court of appeals concluded that its earlier "opinion in *NOPSI I* nonetheless requires us to uphold the district court's decision to abstain" (*id.* at 20A).[5]

4. *State Court Proceedings:* Three separate lawsuits were filed in Louisiana state courts following the issuance of the Council's rate order. First, in a suit against NOPSI and others, the Council sought a declaration that its order represented a just and reasonable exercise of its regulatory authority and that NOPSI's failure to comply with the order would be unlawful. See *Boissiere* v. *Cain*, No. 88-2503 (Civ. Dist. Ct. Parish of Orleans, La., filed Feb. 4, 1988). Second, in a suit filed the same day against the City Council, the Alliance for Affordable Energy (a local consumer organization) sought an order directing the Council to disallow NOPSI's recovery of additional Grand Gulf costs. See *Alliance for Affordable Energy, Inc.* v.

[5] Like the district court, the court of appeals rejected NOPSI's argument that the Federal Power Act provides federal courts with exclusive jurisdiction over NOPSI's preemption claim (Pet. App. 11A-15A). That holding is not challenged by NOPSI's petition and therefore is not before the Court.

Council of New Orleans, No. 88-2502 (Civ. Dist. Ct. Parish of Orleans, La., filed Feb. 4, 1988). The City Council named NOPSI as a "defendant in reconvention" in the second lawsuit and NOPSI removed both cases to the federal district court. The two cases later were remanded pursuant to the federal court's decision to abstain. See Pet. App. 27A & n.6.

The third pending state action is NOPSI's own lawsuit against the Council in which it seeks relief from the Council's rate order on several state law and federal constitutional grounds. See *NOPSI* v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct. Parish of Orleans, La., filed Mar. 7, 1988, amended Mar. 17, 1988). NOPSI's complaint asserted that the rate order was unlawful under state law because it abrogated a settlement agreement with NOPSI, because it was not supported by substantial record evidence, and because it was based on an improper legal standard of prudence. NOPSI also argued that the rate order violated both the state and federal constitutions because it denied NOPSI due process and constituted a taking of property without just compensation. NOPSI's state court complaint, however, did not seek relief based on NOPSI's federal court preemption claim. Nor did it seek preliminary injunctive relief. In a letter to the state court that accompanied its state court filing, NOPSI notified the court of the pendency of its federal court lawsuit against the City Council and explained that it was filing with the state court in order to avoid later being barred by the applicable state limitations period. NOPSI also explained that it had not included its federal preemption claim because the federal courts had exclusive jurisdiction over that claim, but that it wished to reserve the right to include that count in its state complaint should the federal court subsequently dismiss NOPSI's federal lawsuit.

Following the federal district court's dismissal of NOPSI's action on abstention grounds, NOPSI amended its state court complaint to include a federal preemption argument and also filed a motion for preliminary injunctive relief based solely on its claim of federal preemption. On May 5, 1988, the state trial court denied NOPSI's motion for preliminary relief and on February 16, 1989, after denying a request for expedited consideration, the state court of appeals upheld the trial court's refusal to award interim relief. See *NOPSI* v. *Council of New Orleans,* No. 88-CA-1369 (4th Cir. La. Ct. App.). The parties to the state trial court proceeding initiated by NOPSI have filed cross-motions (now pending before that court) in support of petitions for review and/or summary judgment on the merits. NOPSI has limited its argument to, first, its threshold federal preemption claim and, second, its contention that the Council's order is unlawful under state law because it rests on an erroneous prudence standard and on clearly erroneous findings of fact.[6] Oral argument on those motions was held on November 30, 1988.

SUMMARY OF ARGUMENT

Neither *Burford* nor *Younger* abstention is appropriate in this case. The utility has made a substantial federal preemption claim that a local regulatory authority has improperly "trapped" costs allocated to it by FERC pursuant to FERC's exclusive regulatory authority over the terms of

[6] NOPSI has expressly disclaimed any intent to press further its claims that the Council has abrogated its settlement agreement with NOPSI, violated NOPSI's right to procedural due process, issued determinations that are not sufficiently articulated and that contravene the council's own procedural rules, and raised contentions barred by the doctrines of collateral and judicial estoppel. See NOPSI Mem. in Supp. of Pet. for Rev. 3 n.1 (filed Aug. 9, 1988).

sale of power among members of an interstate utility system. The independent interest of any single State in such an inherently interstate dispute is not sufficient to override Congress's decision to provide the federal plaintiff the choice of a federal forum for the vindication of important federal policies. The judgment below should therefore be reversed and the case remanded for consideration of petitioner's preemption claim on the merits; at the very least, the district court should be instructed, on remand, to consider whether interim relief is necessary to prevent irreparable harm to federally protected interests.

1. *Burford* abstention is not appropriate because this case, unlike *Burford,* concerns the scope of federal regulatory law and policy. The federal question whether a particular FERC allocation must be honored by a local regulatory authority in a particular context is, moreover, qualitatively different from the type of broad and amorphous due process claims raised in *Burford* and *Alabama Pub. Serv. Comm'n* v. *Southern Ry.,* 341 U.S. 341, 347 (1951), the only case since *Burford* in which this Court has squarely upheld abstention on the basis of that decision. In the present case, unlike those cases, resolution of the federal constitutional issue does not turn on "predominantly local factors" (*Alabama Pub. Serv. Comm'n* v. *Southern Ry.,* 341 U.S. at 349), and any resulting disruption of state law or policy would be a deliberate result of an elaborate and comprehensive congressionally enacted seheme.

2. *Younger* abstention is inappropriate because considerations of comity – the most vital factor underlying the *Younger* doctrine – are without substantial force where, as in this case, the interests of several States are at odds as a result of their participation in a multistate "common pool." Judicial respect for the notion of comity does not require federal court dismissal, and the attendant delay

and financial uncertainty, when the conflicting interests of more than one state are involved. Moreover, none of the three pending state judicial proceedings is owed any special deference under *Younger* because none implicates any "important" or "vital" state interest that would be impaired if the federal proceeding were allowed to go forward. The Council's state court filing is not an enforcement action, but merely a request for a declaration of the lawfulness of its actions; the Alliance for Affordable Energy's state complaint is principally directed against the Council, not NOPSI, and raises issues entirely secondary to NOPSI's preemption claim; and NOPSI's own state court action is largely protective in nature—guarding against the possibility of federal court abstention—and thus should not be deemed to have foreclosed NOPSI's preference for a federal forum.

3. Even if partial abstention were justified, the district court should, at least, have given full consideration to NOPSI's request for preliminary injunctive relief. Such interim relief would not have prevented the state courts from deciding the merits of NOPSI's preemption argument but could have prevented any irreparable injury to NOPSI—and frustration of federal policy—resulting from the Council's ongoing refusal to allow full recovery of NOPSI's FERC-mandated share of Grand Gulf costs.

ARGUMENT

A FEDERAL DISTRICT COURT SHOULD NOT WHOLLY ABSTAIN FROM ADJUDICATING A CLAIM THAT THE FEDERAL POWER ACT COMPELS A LOCAL REGULATORY AUTHORITY TO ALLOW A MEMBER OF AN INTERSTATE UTILITY SYSTEM TO RECOVER, THROUGH ITS RETAIL RATES, WHOLESALE COSTS ALLOCATED TO IT BY THE FEDERAL ENERGY REGULATORY COMMISSION

A cardinal principle of federal jurisdiction is the presumptive availability of a federal forum for litigants

who properly invoke the constitutional and statutory authority of the federal courts. See, *e.g.*, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *Chicot County* v. *Sherwood*, 148 U.S. 529, 534 (1893). And the principle is one of special importance when the litigant is asking the federal court to vindicate a federal right or to protect a federal interest. The abstention doctrine, which permits a federal court to defer to state proceedings in certain limited situations, is a carefully crafted exception to this fundamental concept. See, *e.g.*, *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 236 (1984); *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 13-16 (1983).

Under the court of appeals' approach, however, abstention could become the rule rather than the exception. *Burford* abstention would be required even where, as in this case, the very premise of the federal complaint is that Congress has decided that paramount national concerns demand preemption of purported local concerns. And *Younger* abstention would be required even in a case, such as this one, where the comity principle underlying *Younger* is rendered inapplicable both by the nature of the federal preemption claim and by the character of the pending state proceedings. Congress's decision to provide NOPSI with the choice of a federal forum should have been respected in this case; the court of appeals' failure to do so has impeded the vindication of important federal policies.

A. *Burford* Abstention Is Not Appropriate

1. The court of appeals erred in concluding that the Council's concern with the "regulation and adjustment of local utility rates," and its "local administrative expertise" (Pet. App. 17A), compel *Burford* abstention in this case.

Burford abstention is required only in cases "involving the possibility of unwarranted disruption of a state administrative process." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 415 n.5 (1964); see *Zwickler* v. *Koota,* 389 U.S. 241, 249 n.11 (1967).[7] This possibility exists when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or when the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. 800, 814 (1976).

Neither circumstance is present here. Resolution of petitioner's claim of federal statutory preemption requires a determination of the scope of *federal* regulatory law and policy. There is "no underlying issue of state law controlling this ligitation." *McNeese* v. *Board of Education,* 373 U.S. 668, 674 (1963). "Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Ibid.* The federal court need only determine the federal question whether, under the Federal Power Act, the Council's refusal to allow NOPSI to recover its FERC-allocated share of Grand Gulf costs (like the MPSC's similar refusal to allow MP&L to recover its FERC-mandated share of those same costs) improperly interferes with FERC's exclusive regulatory authority.

[7] In *Burford,* the Court held that a federal court Fourteenth Amendment challenge to the validity of an order of the Texas Railroad Commission granting a permit to drill oil wells should have been dismissed in favor of resolution by local administrative and judicial forums.

Nor would a federal court's resolution of such a strictly federal question have "an impermissibly disruptive effect on state policy" (*Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. at 815). Any resulting disruption of state law or policy would be a deliberate result of an elaborate and comprehensive congressionally enacted scheme. Congress determined in the Federal Power Act that the proper allocation of power and costs among members of a multistate public utility holding company should be conclusively resolved by a neutral federal administrative forum (FERC) in accordance with federal law. See *Mississippi Power & Light Co.*, slip op. 16-17. To be sure, the Council retains significant authority concerning retail rates. But that authority and the Council's related expertise do not require abstention where there is a substantial federal preemption claim that the Council has exceeded the bounds of its authority by failing to "treat [FERC] allocations as fair and reasonable when determining retail rates" (*Mississippi Power & Light Co.*, slip op. 16)[8] In these circumstances, the underlying premise of

[8] *Mississippi Power & Light Co.* makes clear that, just as local authority over MP&L's retail rates was limited in that case, the Council here "may not enter an order 'trapping' the costs [NOPSI] is mandated to pay under the FERC order • • • or undertake a 'prudence' review for the purpose of deciding whether to enter such an order" (slip op. 17). The court of appeals concluded that "the language of [*Mississippi Power & Light Co.*] seems to foreclose" the Council's inquiry into "NOPSI's asserted imprudence in failing to resell the power it had agreed to, and is now bound by the FERC order to, buy" (Pet. App. 13A).

Although the district court issued its ruling before *Mississippi Power & Light Co.* was decided, that court similarly found little force in the Council's argument against preemption. As described by the district court (Pet. App. 30A), "the Council faults NOPSI not for buying a 'pig in a poke' but for failing to find a sucker to buy it when the faux-pas became apparent." The court added that it "is not ready to

Burford abstention is missing. Cf. *Zablocki* v. *Redhail*, 434 U.S. 374, 379-380 n.5 (1978) ("there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy").

Finally, *Burford* abstention is inapplicable because the narrow federal preemption issue raised in this case is qualitatively different from the broad and amorphous federal due process claims raised both in *Burford* and in *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951), the only post-*Burford* case in which this Court has squarely upheld abstention on the basis of that decision. In *Alabama Pub. Serv. Comm'n*, a railroad argued that a state commission's refusal to permit discontinuance of two intrastate trains constituted an unconstitutional deprivation of its property, and the Court held that the resolution of that claim turned on such "predominantly local factors" (341 U.S. at 349) as the extent of public need for the service in question. Here, unlike *Alabama Pub. Serv. Comm'n*, a federal court is not being asked to resolve an "essentially local problem" (341 U.S. at 348); it is instead being asked to determine the preemptive scope of a complex federal statute for the purpose of ensuring the integrity of a neutral federal administrative agency's resolution of a multistate dispute. That is a task for which "the federal courts are particularly appropriate bodies"

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assume there are many, if any, such suckers purchasing electricity in the wholesale market today" (*id.* at 30A n.11). The district court also commented on the Council's selection of "a figure of 8% for the prudence disallowance," explaining that "the Council, and in this case, everyone else knows that the 8% figure * * * represents the difference between FERC's 17% allocation and what NOPSI consistently claims as its relative share in the MSU system, i.e., 9%. Thus, the disallowed costs bear no apparent relationship to the savings NOPSI is said to have foregone" (*id.* at 30A-31A n.11).

(*United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966)).[9] Significantly, in both *Burford* and *Alabama Pub. Serv. Comm'n*, this Court stressed the absence of any comparable federal governmental role. See *Burford*, 319 U.S. at 319 ("The federal government, for the present at least, has chosen to leave the principal regulatory responsibility with the States."); *Alabama Pub. Serv. Comm'n*, 341 U.S. at 345, 346 n.7 (case involves exercise of State's "primary authority over intrastate transportation" and not a matter "over which the Interstate Commerce Commission is given exclusive authority under 49 U.S.C. §§ 1 (18-20)").[10]

B. *Younger* Abstention Is Not Appropriate

This Court has emphatically rejected the "suggest[ion] that 'every pending proceeding between a State and a federal plaintiff justifie[s] abstention unless one of the exceptions to *Younger* applies." *Moore* v. *Sims*, 442 U.S. 415, 423 n.8 (1979). The court of appeals in this litigation,

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[9] See *Chemical Specialties Mfrs. Ass'n, Inc.* v. *Lowery*, 452 F.2d 431, 433 (2d Cir. 1971) (Friendly, J.) ("[A]bstention is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction.").

[10] In addition, unlike *Burford* or *Alabama Pub. Serv. Comm'n*, the state courts reviewing the Council's orders cannot fairly be described as either "working partners with the [Council] creating a regulatory system for the [electric utility] industry" (319 U.S. at 326) or as "an integral part of the regulatory process" (341 U.S. at 348). See Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1156 (1974). There is no state court with special expertise responsible for reviewing the Council's orders in its capacity as regulator of utilities. Section 4-1604 of the Home Rule Charter of the City of New Orleans simply provides for judicial review of Council decisions by a local municipal court of general jurisdiction.

however, has paid little more than lip service to the important limitations on *Younger* imposed by this Court and, as a result, has upheld abstention in a case wholly lacking in the most "vital consideration" prompting *Younger* abstention—concern for interests of "comity" and "federalism" (401 U.S. at 44).[11] See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619, 626-627 (1986).

1. As described by this Court, the "notion of 'comity' * * * is the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44; see *Middlesex County Ethics Comm'n* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The extent to which comity concerns are implicated by allowing a federal lawsuit to go forward in the face of a parallel state proceeding depends, among other things, on the nature of the federal deprivation alleged.[12] Where, as in this case, the interests of several states are at odds because of their participation in a multistate "common pool," the notion of comity—of allowing each state to perform its separate function—loses much of its force.[13] In such a case, a decision by the tribunals of any

[11] In fact, the court of appeals panel in *NOPSI III* did indicate its awareness of the inappropriateness of *Younger* abstention but clearly felt bound by the panel decision in *NOPSI I*: "The Council's arguments in the successive cases indicate a certain amount of adroitness, but the opinion in *NOPSI I* nonetheless requires us to uphold the district court's decision to abstain" (Pet. App. 20a).

[12] See *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965) (upholding district court's refusal to abstain under *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941)).

[13] The common pool may consist of shared benefits, as in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), or of shared burdens, as in this case and *Mississippi Power & Light Co.*, slip op. 18.

one state in favor of its citizens may have a corresponding direct adverse effect on citizens of other participating states. See *Mississippi Indus.* v. *FERC*, 808 F.2d at 1548-1549; *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898, 904-905 (4th Cir. 1987); *Middle South Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404, 416-417 (8th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); see generally, Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968). Unlike the federal claims at issue in *Younger* and its progeny, therefore, the claims in such inherently interstate disputes are not readily susceptible to resolution by leaving states "free to perform their separate functions in their separate ways." Indeed, it is for that very reason that Congress decided to assign to FERC exclusive authority over such disputes.[14]

We do not, of course, contend that state courts are presumptively incapable of giving neutral consideration to federal preemption claims. "Minimal respect for the state processes * * * precludes any presumption that the state courts will not safeguard federal constitutional rights." *Moore* v. *Sims*, 442 U.S. at 433.[15] Nor do we suggest that abstention is always and necessarily undesirable whenever

[14] Similar concerns underlie this Court's Commerce Clause precedents in which the Court has struck down, even in the absence of conflicting federal legislation, parochial state laws that unduly favor in-state economic interests over interstate commerce. See, *e.g.*, *New Energy Co.* v. *Limbach*, No. 87-654 (May 31, 1988), slip op. 3-4; *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268-269 (1984); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 338-339 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 35-37 (1980); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-624, 627 (1978).

[15] There may, however, be some basis for concern in the circumstances of this case, at least with respect to the underlying administrative order that is challenged in this proceeding. The Council is a popularly elected legislative body. When setting rates, its pro-

a federal plaintiff raises a federal preemption claim. See *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 511-512 (1972) (*Pullman* abstention warranted on claims of federal unconstitutionality and federal statutory preemption). Our view is rather that federal preemption claims, turning as they frequently do on an understanding of a complex federal regulatory scheme, are less likely to present appropriate occasions for deference to state tribunals. See, *e.g.*, *Kentucky West Va. Gas. Co.* v. *Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111, 1116-1117 (3d Cir. 1986).

Whether abstention is justified in a case involving a claim of federal preemption depends, among other things, on the relative significance of the preemption claim in the lawsuit, on its relation to issues of state law, and on the nature of the preemption argument. In our view, all of

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ceedings are not judicial; they are "essentially a legislative function." *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 589 (1945). The Council has also been considering a municipal takeover of NOPSI as a means of avoiding Grand Gulf costs. See *NOPSI* v. *City of New Orleans*, 800 F.2d 488 (5th Cir. 1986).

Moreover, contrary to this Court's assumption in past cases involving *Younger* abstention, it is now no longer true that "where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right" (*Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975)). Congress recently abolished that aspect of this Court's appellate jurisdiction, effective September 25, 1988. See Act of June 27, 1988, Pub. L. No. 100-352, §§ 1, 7, 102 Stat. 662, 664. In view of this change, it would no longer be possible for NOPSI to attempt to frame its arguments in state court in a manner that, in the words of *Huffman*, 420 U.S. at 605, would have "assured [it] of eventual consideration of its claim by this Court" pursuant to its appellate jurisdiction. Cf. *Mississippi Power & Light Co.*, slip op. 14 n.10 (appeal dismissed because appellant "never challenged the constitutionality" of the relevant state statute but "merely argued" that exercise of state authority would violate the Supremacy Clause; certiorari granted).

these factors render abstention inappropriate in this case. NOPSI's preemption claim is substantial and would be dispositive of the merits of the lawsuit (see note 8, *supra*). There are no unresolved threshold issues of state law that must be decided prior to resolution of that claim; indeed, no state law issues of any kind are raised in this proceeding (compare *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. at 511-512; see also *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 11-12 & n.9 (1987)). And, as described above, the special nature of NOPSI's preemption argument, dependent as it is on the resolution of multi-state interests, deprives the considerations underlying *Younger*, particularly the notion of comity, of substantial force. For all these reasons, the kinds of concerns that *Younger* abstention has protected in other cases from "needless obstruction" and "undu[e] interfere[nce]" are not present here. See *Pennzoil Co.* v. *Texaco Inc.* 481 U.S. at 10; *Moore* v. *Sims*, 442 U.S. at 429; *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977); *Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975).

2. The character of the pending state proceedings also militates against *Younger* abstention. *Younger's* genesis, and still its core concern, lie in the need to prevent undue federal court interference with ongoing state criminal proceedings. While the doctrine's reach has been extended to certain state civil and administrative proceedings, abstention in those cases, unlike this one, was necessary in order to safeguard "important" or "vital" state interests.[16]

There are in this controversy three pending state judicial proceedings: (1) the Council's lawsuit seeking a declara-

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[16] See, *e.g.*, *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 12-14; *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. at 627; *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 434; *Moore* v. *Sims*, 442 U.S. at 423; *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

tion of the lawfulness of its action; (2) the Alliance for Affordable Energy's lawsuit seeking additional rate relief for consumers;[17] and (3) NOPSI's lawsuit seeking full recovery, through its retail rates, of its FERC-allocated share of Grand Gulf costs. See pages 10-12, *supra*.[18] NOPSI's federal court complaint does not seek, as in *Younger*, *Ohio Civil Rights Comm'n*, *Middlesex County Ethics Comm.*, *Moore*, or *Huffman*, to enjoin any of these ongoing proceedings. Nor does it intend, as in *Pennzoil* or *Juidice*, to interfere with the "regular operation of [a state's] judicial system" by challenging either its "contempt process" or its "ability * * * to enforce orders and judgments of courts."[19] There will be no "eviscerating

[17] Before the district court decided to abstain, the lawsuits filed by the Council and by the Alliance had been removed by NOPSI to federal district court. See Pet. App. 27A & n.6. Hence, perhaps for that independent reason, *Younger* abstention was not required on their account.

[18] Because NOPSI's present lawsuit challenges the results of the completed administrative proceeding, this case, unlike *NOPSI I*, does not directly present the question whether abstention would be appropriate if such an administrative proceeding were pending. We believe abstention would likewise not be warranted in that context, however, both for the reasons described in our brief filed in response to this Court's invitation in No. 86-49, and because the Council's proceedings, unlike the administrative proceedings challenged in *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U.S. at 628, themselves violated NOPSI's federally protected rights: they unlawfully "trapped" NOPSI's FERC-mandated Grand Gulf costs pending completion of the Council's prudence investigation (see *Mississippi Power & Light Co.*, slip op. 17 & n.12). See *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 468-469 (1943).

[19] For this reason, the Council's reliance on *Pennzoil* (Br. in Opp. 3, 23) is misplaced. The federal injunction sought in *Pennzoil* would have interfered with a "vital" state interest—the execution of state court judgments—and "would [have done] so on grounds that challenge the very process by which those judgments were obtained"

impact on state enforcement action" (*Trainor* v. *Hernandez*, 431 U.S. at 446). The sole impact of the federal court's ruling on the pending state proceedings would be its res judicata effect, which is not in itself enough to warrant abstention; otherwise, contrary to this Court's teachings (see page 19, *supra*), *Younger* abstention would be required virtually any time a related state proceeding was pending.[20]

The pending state proceedings do not themselves implicate any "important" or "vital" state interest. The only discernible purpose of the Council's lawsuit is, by filing a "first-strike" action on the very day its order was issued, to attempt to deny NOPSI its choice of a federal forum.[21]

(slip op. 11). No analogous state interest is implicated in this case. Nor is the constitutional issue here—essentially a question of the preemptive effect of a federal statute under the Supremacy Clause—comparable to the Fourteenth Amendment due process claim that the decision in *Pennzoil* sought to avoid.

[20] Of course, the federal-state friction resulting from the res judicata effect of a federal court ruling may warrant abstention if, as in the case of a criminal prosecution, the affected state proceeding is one vindicating important state interests. See *Deakins* v. *Monaghan*, No. 86-890 (Jan. 12, 1988) slip op. 4-5; *Samuels* v. *Mackell*, 401 U.S. 66, 72-73 (1971).

[21] The Council's lawsuit appears unnecessary because, according to the "Home Rule Charter for the City of New Orleans," the Council's rate orders "go into effect at such time as may be fixed by the Council and shall remain in effect and be complied with, unless and until changed, set aside or suspended by the Council or by a court of competent jurisdiction" (§ 4-1604); the Council resolution challenged in this case was made "effective as of the date of issuance of this resolution." In somewhat analogous circumstances, moreover, the Louisiana courts have ruled that, because of the absence of a concrete controversy, governmental entities may not initiate actions for declaratory relief for the purpose of validating their actions. See *Petition of Sewerage & Water Bd.*, 248 La. 169, 175-176, 177 So. 2d 276 (1965); *State* v. *Board of Supervisors*, 228 La. 951, 84 So. 2d 597, 599-600 (1955); *City of Alexandria* v. *Wilks*, 18 So. 2d 341, 344 (La. Ct. App. 1944).

The Council's lawsuit thus shares little in common with the type of state criminal and civil enforcement proceedings that have been held entitled to deference under *Younger*. Indeed, it would seem more akin to the type of first-strike collateral litigation *Younger* was designed to discourage.

Similarly, the state lawsuit filed by the Alliance for Affordable Energy, also within hours of the issuance of the Council's order, is owed no deference under *Younger*. It is principally directed at the Council, not NOPSI, and it raises the wholly subordinate issue whether the Council erred in not denying NOPSI recovery of an even larger proportion of its FERC-mandated share of Grand Gulf costs. Any state interest in that issue, which need be reached only if the Council has not already invaded FERC's exclusive regulatory authority, plainly cannot trump NOPSI's right to choose a federal forum for resolution of the threshold and controlling issue of federal law.

Finally, NOPSI should not be deemed to have triggered *Younger* abstention by its own protective filing of a state court action subsequent to its filing of the instant federal lawsuit. Because of the unsettled nature of the abstention issue, NOPSI was, in effect, compelled to initiate a parallel state court proceeding in order to protect itself against the possibility of federal court abstention after the applicable limitations period had run.[22] Action taken by

[22] Significantly, the state law issues being litigated in NOPSI's state court action are, like those raised by the Alliance for Affordable Energy, narrowly focused and entirely secondary to the threshold preemption claim presented by its federal complaint; they concern the validity of the Council's prudence findings and need be reached only if NOPSI's preemption claim is rejected (see pages 11-12 and note 6, *supra*). Moreover, to the extent that NOPSI has since addressed in its state filings the federal preemption issue, which the state court of appeals recently described as "the primary issue to be decided at the trial on the merits of this case" (*NOPSI* v. *The Council of the City of New Orleans, et al.*, No. 88-CA-1369 (4th Cir. La. Ct App., Feb. 16, 1989), slip op. 6), NOPSI did so only after the federal district court dismissed this lawsuit on abstention grounds. See page 12, *supra*.

Finally, abstention should not now be upheld on the ground that the state courts may determine the merits while the federal proceedings are pending, possibly injecting issues of res judicata into any future federal court consideration of the preemption question. See *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 607-608 & n.19. The possibility of such a state ruling need not prevent this Court from addressing the fundamental question whether, at the time of the federal district court's decision, total abstention was appropriate. See *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. at 17 ("In this opinion, we have addressed the situation that existed on the morning of December 10, 1985, when this case was filed in the United States District Court for the Southern District of New York."). Any issues of res judicata that may arise after that time may properly be addressed on remand.

a prudent plaintiff in order to preserve its right to seek relief in some forum should not, perversely, now deprive that plaintiff of the right to have its preference for a federal forum respected.[23]

C. The District Court Should, At The Very Least, Have Considered Whether Interim Injunctive Relief Was Necessary To Prevent Irreparable Harm To Federally Protected Interests Pending Completion Of Any State Court Proceedings On The Preemption Claim

For the reasons described above, we believe that abstention in this case is not warranted. Hence, NOPSI's choice of a federal forum for the resolution of its claim of preemption should be honored. If it is determined, however, that limited abstention is appropriate, we submit that the district court nonetheless erred by failing to con-

[23] Presumably, NOPSI could choose to dismiss voluntarily its state court action, thereby unilaterally eliminating that parallel state proceeding.

sider NOPSI's request for *preliminary* injunctive relief. That request, based solely on a claim of irreparable injury to a protected federal interest, should be entertained by the district court. For if, as NOPSI claims, the denial of interim relief may, as a practical matter, result in the permanent "trapping" of FERC-allocated costs and thus in the frustrating of federal policy, then such relief is necessary to vindicate that policy.[24] At the same time, the granting of interim relief would not, in itself, interfere with the ability of state tribunals to decide NOPSI's claims on their merits. It would only prevent the infliction of irreparable harm in the meantime.

The value of interim federal relief in cases appropriate for abstention is elaborated in a thoughtful article by Professor Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 Cornell L. Rev. 65 (1977). After careful analysis, Professor Wells concludes that when a balance of the interests involved warrants the prevention of irreparable injury—even when abstention is called for—

> [I]nterim relief, rather than refusal to abstain or abstention coupled with condolences for the plaintiff,

[24] Certainly NOPSI's experience in this litigation supports its claim. As *NOPSI I* vividly illustrated, a utility's liability for wholesale rates may be immediate and ongoing, and a delay in passing on those costs through retail rates will often have consequences that are irreparable; it may create immediate cash flow problems and uncertainties that threaten bankruptcy, impede securities offerings, and force compromise settlements (see pages 6, 9, *supra*). Abstention without consideration of appropriate preliminary relief may contribute to, and even precipitate this result. Indeed, for this reason, respondent's reliance (Br. in Opp. 25) on the availability of this Court's eventual review of any state court ruling, even if such review could be assured (see note 15, *supra*), is misplaced. (As noted above, the state courts have so far denied NOPSI's request for preliminary relief. See page 12, *supra*.)

> may offer courts the most appropriate response. Interim relief can and should accommodate both the policies served by abstention and the plaintiff's interests in vindicating constitutional rights.

Id. at 82.

Such limited abstention would not be novel. In related contexts, this Court and lower courts have previously recognized or endorsed the appropriateness of a limited form of abstention, coupled with preliminary relief, in order to avoid irreparable harm. See, *e.g.*, *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 312 n.18 (1979) ("this is a matter that is best addressed by the District Court in the first instance");[25] *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 45 n.13 (1st Cir. 1984); *Spartacus, Inc.* v. *Borough of McKees Rocks*, 694 F.2d 947, 949 & n.3 (3d Cir. 1982); *Catrone* v. *Massachusetts State Racing Comm'n*, 535 F.2d 669, 672 (1st Cir. 1976); *Cox Cable Communications, Inc.* v. *Simpson*, 569 F. Supp. 507, 515-522 (D. Neb. 1983); cf. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957) (upholding injunction against prosecution of state action to determine title but staying federal proceeding until state court interpretation of state law could be obtained); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).[26] See also P. Bator, D.

[25] The question of preliminary relief presented in this case is, of course, different from that raised in *Pennzoil*. Texaco's entire federal claim in that case was that it was constitutionally entitled to a stay of the trial court's judgment pending appeal; hence, a federal court decision in Texaco's favor would have disposed of the very issue held appropriate for abstention.

[26] In *Pike*, this Court concluded that "[i]n view of the emergency situation presented, and the fact that only a narrow and specific application of the [state statute] was challenged as unconstitutional," a federal district court had been "fully justified in not abstaining from the exercise of its jurisdiction pending litigation in the state courts" and in granting a preliminary injunction (397 U.S. at 140 n.3). The

Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1375, 1422-1423 (3d ed. 1988); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 237-238.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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federal plaintiff in *Pike* faced the "imminent loss of its anticipated 1968 cantaloupe crop in the gross amount of $70,000" (*id.* at 140). Although the Court in that case was reviewing a district court's refusal to abstain at all, the same considerations that supported that refusal would surely have supported a decision to abstain only in part.

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